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Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-1311**

SHELL OIL COMPANY, SHELL PIPELINE CORPORATION, AMERICAN OIL COMPANY, a/k/a AMOCO OIL COMPANY AND STANDARD OIL COMPANY (INDIANA),
Petitioners,

v.

FRED WEBER, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
RULES INVOLVED	3
STATEMENT OF THE CASE	3
A. The Prior Criminal Proceeding Involving Shell, Amoco and Clients of the Lashly Firm	4
B. The Proceedings Below	7
1. The Original Complaint	7
2. The Advent of the Lashly Firm and the Filing of the Amended Complaint	7
3. Judge Regan Recuses Himself	9
4. The Opinions of the Courts Below	10
REASONS FOR GRANTING THE WRIT	11
A. In Holding that Access to Confidences Is Insufficient to Mandate Disqualification, The Decision Conflicts with Decisions of the Court of Appeals for the Second Circuit	11
B. The Decision Threatens an Abuse of Confidences Exchanged Under Protection of the Attorney-Client Privilege	18
C. The Panel's Decision Threatens the Manageability of Multi-Party Litigation	20
D. The Panel Ignored the Undisputed Evidence Which Establishes that the Lashly Firm Received Confidences of Shell and Amoco	22
CONCLUSION	23

TABLE OF AUTHORITIES

Cases: Page

Burlington Industries v. *Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974) 18
Continental Oil Co. v. *United States*, 330 F.2d 347 (9th Cir. 1964) 18
Chugach Elec. Ass'n v. *United States District Court for the District of Alaska*, 370 F.2d 441 (9th Cir. 1966) *cert. denied*, 389 U.S. 820 (1967) 13, 19
Emle Industries, Inc. v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973) 13, 14, 18, 19
Estates Theatres Inc. v. *Columbia Pictures Industry, Inc.*, 345 F. Supp. 93 (S.D.N.Y. 1972) .. 14
Fund of Funds, Ltd. v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1978) 13, 15, 16
Hull v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975) 13, 15
Hunydee v. *United States*, 355 F.2d 183 (9th Cir. 1965) 18
In re Grand Jury Subpoena Duces Tecum, 406 F. Supp. 381 (S.D.N.Y. 1975) 18
Leonia Amusement Corp. v. *Loew's Inc.*, 13 F.R.D. 438 (S.D.N.Y. 1952) 18
NCK Organization Ltd. v. *Bregman*, 542 F.2d 128 (2d Cir. 1976) 13, 15
Richardson v. *Hamilton International Corp.*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973) 13
Smith v. *Bentley*, 9 F.R.D. 489 (S.D.N.Y. 1949) 18
T. C. Theatre Corp. v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953) 12, 13, 14, 19
Transmirra Products Corp. v. *Monsanto Chemical Co.*, 26 F.R.D. 572 (S.D.N.Y. 1960) 18
W. E. Bassett v. *H. C. Cook Co.*, 201 F. Supp. 821 (D. Conn. 1962) 14
Wilson P. Abraham Construction Corp. v. *Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977) 17

TABLE OF AUTHORITIES—Continued

Statutes: Page

28 U.S.C. § 1254(1) 2
Robinson-Patman Act, 15 U.S.C. § 13(a) 7
Sherman Act, 15 U.S.C. §§ 1, 2 8

Miscellaneous:

ABA Code of Professional Responsibility, Canon 4, Canon 9 (1976) 3, 12, 19
Department of Justice Proposed Draft Bill Amending Rule 23, Federal Rules of Civil Procedure § 3021(b) 21
H. Drinker, *Legal Ethics* (1953) 16, 17
Manual for Complex Litigation, § 1.92, § 1.93 (1977) 20
Proposed Federal Rules of Evidence, Standard 503(b), 56 F.R.D. 183 (1972) 18
2 Weinstein and Berger, *Weinstein's Evidence* ¶ 50 [02] (1976) 18

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Petitioners,

v.

FRED WEBER, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Shell Oil Company and Shell Pipeline Company ("Shell") and Amoco Oil Company and Standard Oil Company (Indiana) ("Amoco") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on November 30, 1977.

OPINIONS BELOW

The opinion of the panel of the Court of Appeals * is reported at 566 F.2d 602 (8th Cir. 1977) and is set forth in the Appendix at 1a. The order denying peti-

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* The panel was composed of Judges Stephenson and Van Oosterhout of the Eighth Circuit and Judge Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

tioners' motions for rehearing and suggestions for rehearing *en banc* is set forth in the Appendix at 15a. The opinion of the United States District Court for the Eastern District of Missouri is reported at 432 F. Supp. 694 (1977) and is reproduced in the Appendix at 17a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

A judgment of the Court of Appeals for the Eighth Circuit was entered on November 30, 1977. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on December 28, 1977 and this petition for *certiorari* is filed within 90 days of that date.

QUESTIONS PRESENTED

I. Whether attorneys who participate actively in and cooperate fully with counsel for co-defendants in the joint defense of one litigation and who have access to confidences of such defendants by reason of that relationship are prohibited by the Code of Professional Responsibility and the requirements of sound judicial administration from subsequently acting as opposing counsel against those same defendants in litigation alleged to be substantially related to the prior litigation.

II. Whether the Panel and the District Court, instead of applying the prevailing rule requiring petitioners to demonstrate only that opposing counsel had *access* to their confidences in the prior representation, applied an improper standard in requiring petitioners to disclose specific confidences actually received by opposing counsel.

III. If proof of actual receipt of confidential information is required for disqualification of opposing counsel

in the circumstances enumerated above, whether there were sufficient facts establishing that such counsel did, in fact, receive information exchanged in confidence by petitioners in the prior litigation.

RULES INVOLVED

This case involves the construction and proper application of Canons 4 and 9 of the American Bar Association's Code of Professional Responsibility, adopted by the Missouri Supreme Court as Rule 4 of the State's Rules Governing the Bar and Judiciary.[1]

STATEMENT OF THE CASE

This petition seeks review of an unprecedented decision of a panel of the United States Court of Appeals for the Eighth Circuit which permits an attorney to change sides in litigation and accept representation against parties to whose confidences he previously had access under protection of the attorney-client privilege in proceedings which are claimed to be substantially related to the subject matter of his present representation. The panel's decision impermissibly sanctions behavior which threatens an abuse of a confidential relationship and which creates at least an appearance of impropriety in violation of the Code of Professional Responsibility. It directly conflicts with decisions of the United States Court of Appeals for the Second Circuit in which opposing counsel are disqualified if they have had access to a party's confidences through a prior confidential relationship. Further, if not

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[1] Canon 4 provides that "A Lawyer Should Preserve the Confidences and Secrets of a Client."

Canon 9 commands that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety," though none is actually present, thereby codifying the general precept that a "lawyer should promote public confidence in our system and in the legal profession." ABA Code of Professional Responsibility, Ethical Consideration 9-1.

reversed, the panel's decision will inevitably preclude co-operation among counsel for co-defendants in multi-defendant litigation, thereby increasing the unmanageability of such litigation and chilling defendants' exercise of their constitutional right to effective assistance of counsel.

A. The Prior Criminal Proceedings Involving Shell, Amoco and Clients of the Lashly Firm.

Plaintiff Fred Weber, Inc. ("Weber") is represented in this case against Shell and Amoco, defendants below, by the law firm of Lashly, Caruthers, Thies, Rava and Hamel ("Lashly firm") and three partners of that firm, Edward D. Weakley, William I. Rutherford and Paul B. Rava. During 1964 and 1965, the Lashly firm, including Mr. Rava, represented six co-respondents and co-defendants of Shell and Amoco during a nine-month grand jury investigation and an ensuing criminal case, *United States* v. *American Oil Co., et al.*, No. 65 CR 150(3), which the courts below found to be substantially related to the present litigation.[2]

It is undisputed that during the course of such prior criminal proceedings counsel for Shell and Amoco and the members of the Lashly firm joined other defense counsel in a cooperative effort to investigate the nature of the evidence adduced against them, the scope of the potential liability to which they might be exposed, the identity of the witnesses summoned before the grand

[2] John H. Lashly and Paul B. Rava and the Lashly firm represented Kerr-McGee Oil Industries, Inc. and its employee Jack Mitchell, Edward C. Gomes (President and a stockholder of Missouri Petroleum Products Company), and O. Homer Riffe (of Riffe Petroleum Company). In addition, C. Kenneth Thies, who became a member of the Lashly firm on January 1, 1973, but who is now deceased, represented Phillips Petroleum Company, and Rexford H. Caruthers, who became a member of the Lashly firm on January 1, 1968, represented Patricia Lorenz (President of Union Asphalts and Roadoils, Inc.).

jury and the nature of the grand jury testimony of witnesses. In pursuit of this goal, defense counsel met repeatedly to discuss the status of the case, the results of their investigation and the proper course of future action, including the crucial decision of all defendants to change their initial pleas to the indictment of not guilty to pleas of *nolo contendere*. Defense counsel agreed to develop and assist each other in developing information from their clients and to cooperate in preparing the common defense.

Shortly after the commencement of the grand jury investigation, on October 20, 1964, Paul Rava of the Lashly firm initiated attempts to obtain information from John Hichew and Richmond Coburn, counsel for Shell and Amoco respectively, and suggested that the attorneys cooperate and exchange information.[3] Mr. Rava and counsel for Shell and Amoco and others *agreed* to exchange a variety of information in confidence, including debriefing memoranda of their respective grand jury witnesses.[4] Debriefing memoranda, including those of Shell and Amoco witnesses and clients of the Lashly firm, were deposited in the law offices of Mr. Coburn, where they were available to all and reviewed by various counsel for other defendants.[5] *According to the Lashly firm's own billing statement to their client Kerr-McGee Oil Industries, Inc., members of the Lashly firm in fact reviewed debriefing statements in connection with the case.*[6] Counsel for all defendants promised to develop in-

[3] *In Camera* Submission of Defendants Shell Oil Company and Amoco Oil Company, B-6, B-9. (Citations are to material contained in the record below.)

[4] *Id.* B-1 through B-6, B-31, C-3, C-4, C-32, C-36, C-61; Supplemental Submission of Defendants Shell Oil Company and Amoco Oil Company in Support of Motion to Disqualify, February 23, 1977; August 24, 1965 memorandum at 7; June 1, 1977 hearing, Tr. 18-21.

[5] *Id.* at B-1 through B-4; B-31 through B-34; C-61.

[6] June 3, 1977 hearing, Shell's Exhibit A, included in the Appendix at 23a.

formation from their clients.[7] A list of all grand jury witnesses compiled through the cooperative efforts of attorneys for the witnesses was distributed to all defense counsel, including Mr. Rava.[8] A joint defense fund was created.[9]

At counsel meetings, counsel for Shell and Amoco discussed their clients' plea intentions, including the consequences of proceeding to trial. As Mr. Coburn testified: "The evidence that we thought we had to face was discussed in the [counsel] meetings." [10] Mr. Rava of the Lashly firm admitted that he made efforts to develop information from other counsel relating to his client; that he had various contacts with Shell's counsel, John Hichew, and other counsel, "to find out something about the scope of what was going on . . . [and] the possible liability that may flow from the subpoena;" and that he followed the course of the grand jury proceeding and sought to determine the identity of the witnesses.[11]

Communications among counsel involved in the preparation of the joint defense effort were confidential. Describing this aspect of the prior proceedings, William H. Webster, a Judge of the Court of Appeals for the Eighth Circuit at the time he testified below (now Director of the Federal Bureau of Investigation), and counsel for another co-defendant of Shell and Amoco in the *American Oil* case, testified that counsel "agreed" discussions concerning grand jury testimony "should only be between

[7] Supplemental Submission of Defendants Shell Oil Company and Amoco Oil Company in Support of Motion to Disqualify, February 23, 1977; August 24, 1965 memorandum at 7.

[8] *Id.*

[9] *Id.* at 1-2.

[10] June 1, 1977 hearing, Tr. 24-25; *In Camera* Submission of Defendants Shell Oil Company and Amoco Oil Company, C-42, C-43, C-51.

[11] June 3, 1977 hearing, Tr. 98-100, 109.

attorneys representing defendants" [12] and that, in general, all communications among counsel were understood to be confidential since "we were in a common undertaking in the sense that we were representing joint defendants . . ." [13] Judge Webster, called by the Lashly firm as a witness, testified that he met with other counsel and discussed the substance of the grand jury testimony of their respective clients.[14] Indeed, before counsel for a number of co-defendants agreed to exchange debriefing memoranda of their employees' grand jury testimony with counsel for other defendants, they satisfied themselves that such communications were protected by the attorney-client privilege and the attorneys' work-product doctrine.[15]

B. The Proceedings Below.

1. *The Original Complaint.*

Fred Weber, Inc.'s original complaint here was filed on December 8, 1975, by Edward Weakley, then of the law firm of Boyle, Priest, Elliott & Weakley. It named only one defendant, Shell Oil Company, and was limited to certain breach of contract claims and an allegation of price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13(a).

The case was assigned to the Honorable John K. Regan.

2. *The Advent of the Lashly Firm and the Filing of the Amended Complaint.*

Thereafter, Mr. Weakley joined the Lashly firm. The Lashly firm and two of its partners, Paul Rava and William Rutherford, then became additional counsel of

[12] June 1, 1977 hearing, Tr. 58-59.

[13] *Id.* at 70-71.

[14] *Id.* at 50-51.

[15] Second Supplemental Submission of Defendants Shell Oil Company and Amoco Oil Company; Testimony of Richmond Coburn, Tr. 33.

record for Fred Weber, Inc. On May 3, 1976, Fred Weber, Inc., now represented by the Lashly firm, *ex parte*, filed an Amended Complaint, naming Standard Oil Company (Indiana), Amoco Oil Company and Shell Pipeline Corporation, as new defendants and adding counts which alleged, for the first time, that, since at least 1964, Shell and Amoco, along with other unnamed co-conspirators, conspired to fix prices and restrain trade in the sale of asphalt products in the State of Missouri in violation of the Sherman Act, 15 U.S.C. §§ 1, 2. The 1976 Amended Complaint, filed after the Lashly firm first entered the case, alleged substantially the charge of the 1965 indictment in *United States* v. *American Oil Company, et al.*, No. 65 CR 150(3), and alleged that the practices had continued since at least 1964.

During discovery in this case, the Lashly firm has indicated its intent to connect the subject matter of the two cases. Indeed, most recently, on March 8, 1978, in response to interrogatories requesting all facts in support of plaintiff's contention that the alleged conspiracy began not later than 1964, plaintiff expressly refers to the previous litigation and states:

> The underlying facts of defendant Shell and defendant Amoco's participation in the 1964 conspiracy may or may not be a part of the same conspiracy charged in the Amended Complaint. Such facts will at a minimum be admissible in the instant case on the issue of the historical intention of defendants Shell and Amoco to conspire to fix prices in asphalt products. This Court has held that the 1965 case is substantially related to this one. The nature and extent of that relationship will be the subject of further discovery.[16]

[16] Plaintiff's Answers and Objections to Certain of Shell's Interrogatories, Second Set, at 17, filed in the district court on March 8, 1978.

Yet, the Lashly firm previously had access to confidences of Shell and Amoco through the joint defense effort in the very litigation whose underlying facts they now seek to use against Shell and Amoco.

3. *Judge Regan Recuses Himself.*

On December 10, 1976, following a hearing on Shell's motion for partial summary judgment based upon the execution by Fred Weber, Inc. of two contracts containing release provisions, Judge Regan, *sua sponte*, recused himself "to avoid the appearance of impropriety" resulting from the fact that he had been the presiding judge in *United States* v. *American Oil Company, et al.*, No. 65 CR 150(3). After comparing the allegations of the 1965 indictment and Fred Weber, Inc.'s Amended Complaint, Judge Regan stated:

> Although the Court does not have a personal bias or prejudice concerning any party to the present case, the knowledge acquired in the criminal case and conclusions reached therein cannot be completely divorced from the mind of the Court. Hence, it is our view that in this situation the impartiality of the Court might reasonably be questioned, even though the parties have disclaimed any such purpose. In the exercise of our discretion and to avoid the appearance of impropriety, we believe that the ends of justice will be best served if this Court disqualifies itself in this case. (December 10, 1976 Order at 2.)

The case was then transferred to the Honorable John F. Nangle.

One month later, on January 10, 1977, Shell and Amoco jointly filed a motion to disqualify the Lashly firm as counsel for Fred Weber, Inc. due to that firm's prior representation of numerous co-defendants of Shell and Amoco in the earlier criminal proceedings, during the course of which they had access to confidences of Shell and Amoco.

4. *The Opinions of the Courts Below.*

The district court and the panel found that the Lashly firm represented numerous co-defendants of Shell and Amoco in *United States* v. *American Oil Company, et al.*, No. 65 CR 150(3), and that that litigation was substantially related to the present case.[17] The courts below also found that counsel for defendants in the prior proceedings agreed to cooperate fully in a common defense effort and that, as a result, members of the Lashly firm had the opportunity to review debriefing memoranda of grand jury testimony of defendants' personnel (App. 18a), including personnel of Shell and Amoco, which were maintained in a central depository in Mr. Coburn's office. There is no dispute that the Lashly firm had *access* to confidences of Shell and Amoco.

Nevertheless, both the district court and the panel denied the motion to disqualify on the sole ground that Shell and Amoco failed to establish that members of the Lashly firm actually received specific confidences of Shell and Amoco during the pendency of *United States* v. *American Oil Company, et al.*, No. 65 CR 150(3). (App. 18a)

The decisions of the district court and panel established a new and erroneous standard of proof, contrary to the prevailing case law which requires only a showing of *access* to confidential information for disqualification of counsel. Moreover, the courts failed to make any find-

[17] The standards for determining the existence of substantial relationship between two matters for purposes of disqualification of counsel are completely different from those governing the introduction of evidence. The allegations of violations of the antitrust laws in the two cases are substantially similar and the Lashly firm has indicated its intention to connect the two cases. On that basis the district court held that the two cases were substantially related. There was no evidence in the record as to the merits of either case. Shell and Amoco deny that they have violated the antitrust laws.

ing concerning the exchange of confidential information during the nine-month period of the grand jury investigation, a finding essential even under the erroneous standard of their decisions. The courts also failed to consider the impact of their ruling upon the conduct of multi-party litigation in which cooperation among co-counsel having a community of interest is required if such litigation is to be manageable and if parties are to obtain adequate representation by counsel.

REASONS FOR GRANTING THE WRIT

A. In Holding That Access to Confidences Is Insufficient to Mandate Disqualification, the Decision Conflicts With Decisions of the Court of Appeals for the Second Circuit.

Whether an attorney should be disqualified from representing a party in litigation against a party with whom he previously had a confidential relationship presents a question of acute sensitivity and importance, touching upon vital concerns of the legal profession and the public's interest in the scrupulous administration of justice.

Shell and Amoco now find themselves facing opposing counsel who previously had a confidential relationship with their counsel in earlier litigation which plaintiff alleges and the courts below found to be substantially related to the instant case. Surely, an attorney's ethical obligations with regard to the preservation of confidences prohibit such changing of sides. No client should ever be concerned with the possible use against him in future litigation of what he disclosed to his attorney or what his attorney disclosed to co-counsel in a joint defense to criminal charges.

Today, more than ever, litigation in federal courts is characterized by complex, multi-party cases involving numerous co-defendants, particularly in antitrust cases

as here. It is important for this Court to establish the rules of disqualification so that litigants will know whether disclosure of their confidences in a joint effort may subsequently be abused by counsel changing sides in substantially related litigation. Once this Court has set the rules, parties may govern their conduct accordingly.

Canons 4 and 9 of the American Bar Association's Code of Professional Responsibility establish strict standards of professional conduct which prohibit attorneys from abusing confidences reposed in them and from engaging in conduct which suggests even an appearance of impropriety. Disqualification of counsel is the means by which courts enforce these ethical obligations to prevent abuse of confidential relationships. Absent disqualification, the moral injunctions found in the Code of Professional Responsibility are meaningless.

The standard which governs the disposition of a motion to disqualify counsel on the basis of a prior professional relationship is one of *access* to confidences as a result of that relationship. In *T.C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953), the leading and most frequently followed case on disqualification, Judge Weinfeld ruled that

> [w]here any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited.
>
> . . .
>
> [T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained. (*Id.* at 268-69)

The standard set forth in *T.C. Theatre*—that a party need not demonstrate actual receipt of confidences by counsel—has been universally adopted by the courts. *E.g.*, *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *Chugach Elec. Ass'n* v. *United States District Court for the District of Alaska*, 370 F.2d 441 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967). It applies whether or not there has been a direct attorney-client relationship with the counsel sought to be disqualified. *See, e.g., Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128 (2d Cir. 1976); *Hull* v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975).

The reason for not requiring proof of actual receipt of specific confidences once *access* to such confidences by a prior confidential relationship has been established is obvious and compelling. If a party must demonstrate not only access, but also actual exchange of confidences, then it will, as a matter of necessity, have to disclose the very confidences sought to be protected in violation of the attorney-client privilege. As Judge Weinfeld stated:

> For the Court to probe further and sift the confidences in fact revealed would require the disclosure of the very matters intended to be protected by the rule. It would defeat an important purpose of the rule of secrecy—to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause. Considerations of public policy, no

less than the client's private interest, require rigid enforcement of the rule against disclosure. (*T.C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953).)

See Emle Industries, Inc. v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973) ("Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 . . . .")

The panel recognized this principle, but limited its application to the situation where a party seeks to disqualify its former counsel, stating that then one need not show that there was, in fact, an exchange of confidences because the "compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved" (App. 9a.).

This, however, is precisely the situation presented here where the Lashly firm's access to confidences of Shell and Amoco is undisputed. The panel distinguished the present case on the basis that the Lashly firm had not repreesnted Shell and Amoco directly but had only represented co-defendants of Shell and Amoco.

That distinction, however, is directly contrary to decisions of the Second Circuit and ignores the fundamental basis for the *access* standard. A prior direct attorney-client relationship is not a prerequisite to disqualification. *See, e.g., Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973); *Estates Theaters, Inc.* v. *Columbia Pictures Indus., Inc.*, 345 F. Supp. 93 (S.D.N.Y. 1972); *W. E. Bassett Co.* v. *H. C. Cook Co.*, 201 F. Supp. 821 (D. Conn. 1962) (disqualified attorney never represented party seeking disqualification).

In three recent cases, the Second Circuit disqualified counsel from any further representation against an opponent to whose confidences they had *access*, notwithstanding the fact that they had never represented that party nor had they been shown to have received any confidences of that party. *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977); *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128 (2d Cir. 1976); *Hull* v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975). Indeed, the Second Circuit specifically rejected "as overly technical" the argument, identical to that adopted by both the district court and court of appeals here, that proof of actual receipt of specific confidential information was required as a precondition to disqualification in the absence of the existence of an express attorney-client relationship.[18] *NCK Organization Ltd.* v. *Bregman*, 542 F.2d at 134; *Hull* v. *Celanese Corp.*, 513 F.2d at 571-72.

Rather, the rule governing disqualification in the Second Circuit is that disqualification is required ". . . where some evidence exists of the possibility that disclosures were made in the past of which the [counsel] cannot dispossess itself . . ." *NCK Org'n Ltd.* v. *Bregman*, 542 F.2d at 134. Or, stated slightly differently: whether the attorney, though never having represented the party

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[18] The panel's attempted distinction of the *NCK* and *Hull* cases (App. 10a) reflects an obvious and serious misreading of those two cases.

The panel suggests that the two cases are consistent with its ruling that no court has ever applied the presumption of exchange of confidences required by Canon 4 of the American Bar Association's Code of Professional Responsibility in the absence of an attorney-client relationship. In neither case, however, was there an attorney-client relationship between the party seeking disqualification and counsel who was disqualified. The only attorney-client relationship which existed in those two cases—that between the party seeking disqualification and the attorney through whom opposing counsel had access to the moving party's confidences—is also present here where Shell and Amoco communicated confidences to their own counsel who, in the conduct of a joint defense effort and under the protection of the attorney-client privilege, made such confidences available to counsel for other defendants.

seeking disqualification, was, "through his relationship" with that party's counsel, "in a position to receive relevant confidences . . .," *Fund of Funds* v. *Arthur Andersen & Co.*, 567 F.2d at 235.

Both Judge Webster and Mr. Coburn testified as to the extensive exchanges of confidential information among counsel during the grand jury investigation and subsequent criminal case. For Shell and Amoco to have elicited further testimony would have necessitated the disclosure of the very confidences exchanged among counsel which are sought to be preserved.

Mr. Rava admitted that he discussed the grand jury investigation with Mr. Hichew. Although Mr. Rava did not recall looking at debriefing memoranda which were available to him for review in Mr. Coburn's office, the Lashly firm's billing statement describes as one of the services rendered to their client Kerr-McGee "review of debriefing statements", and copies of debriefing statements of the Lashly firm's clients were maintained in the joint depository in Mr. Coburn's office for review by other counsel. If Shell had further cross-examined Mr. Rava, it would have entailed, among other things, the showing of Shell's debriefing statements to him in an effort to refresh his recollection as to the confidences imparted to him by Shell's counsel, who is now deceased. Thus, just as in the case where an attorney-client relationship exists, the very confidences Shell seeks to preserve would be disclosed.

Recognizing the unacceptability of such disclosure of confidences, Henry S. Drinker, in the classic text on legal ethics, stated:

> [W]here counsel is aware that confidence has been reposed in him by someone not his client, but who has been assisting his client with information, he should not afterwards act against that person in any matter in which such information would be material. (*Legal Ethics* at 106 (1953).)

No less is required here. To compel disclosure of the actual confidences previously entrusted to counsel would tear aside the protective cloak drawn about the attorney-client relationship.

The conflict between the Eighth and Second Circuits could not be more plain or irreconcilable: the Lashly firm would be disqualified in the Second Circuit because it had *access* to confidences of Shell and Amoco, whereas in the Eighth Circuit it is permitted to switch sides and continue its representation.[19]

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[19] While the appeal here was pending in the Eighth Circuit, the Court of Appeals for the Fifth Circuit decided *Wilson P. Abraham Construction Corp.* v. *Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977), which also involved the issue of disqualification of counsel who had previously represented a co-defendant in an earlier related proceeding. The Fifth Circuit stated:

> Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related to the matters in which the attorney was previously involved, and wherein confidential exchanges of information took place between the various co-defendants in preparation of a joint defense. *Id.* at 253.

The Fifth Circuit indicated that if counsel had been *privy* to confidences of his co-defendants, he should not be permitted to change sides in subsequent related litigation. The court set aside the district court order denying the motion to disqualify and remanded for the entry of formal findings of fact as to the content of the information exchanged among counsel and whether or not the present litigation was substantially related to the prior one. Here, in contrast, it is undisputed that the Lashly firm had *access* to debriefing memoranda of Shell and Amoco grand jury witnesses and that the panel found that the prior proceedings are substantially related to the instant case.

B. The Decision Threatens an Abuse of Confidences Exchanged Under Protection of the Attorney-Client Privilege.

During the prior criminal proceedings, Judge Regan directed that the defendants cooperate, and counsel for Shell and Amoco exchanged a variety of confidential information with other defense counsel. These exchanges were made in confidence and under the protection of the attorney-client privilege, which although normally waived by disclosure to third parties, has been specially extended to protect such joint defense exchanges.[20] *In re Grand Jury Subpoena Duces Tecum*, 406 F. Supp. 381 (S.D.N.Y. 1975); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Co.* v. *United States*, 330 F.2d 347 (9th Cir. 1964). Protecting such confidential communications is an important part of the client's right to adequate representation by counsel. *Continental Oil Co.* v. *United States*, 330 F.2d at 350.

The panel's ruling, however, threatens the inviolability of such confidential communications by permitting an attorney to manipulate a confidence acquired in an earlier representation and to transform it into a telling advantage in subsequent litigation. *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973). It

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[20] *See also* Standard 503(b) of the Proposed Federal Rules of Evidence, 56 F.R.D. 183 (1972), approved by this Court ("A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . (3) by him or his lawyer to a lawyer representing another in a matter of common interest. . . ."); 2 Weinstein and Berger, *Weinstein's Evidence* ¶ 50 [02] at 501-20.4 to 501-20.5 (1976).

Likewise, the work product of attorneys engaged in a common defense is protected from disclosure. *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974); *Transmirra Products Corp.* v. *Monsanto Chemical Co.*, 26 F.R.D. 572, 578 (S.D.N.Y. 1960); *Leonia Amusement Corp.* v. *Loew's Inc.*, 13 F.R.D. 438, 440 (S.D.N.Y. 1952); *Smith* v. *Bentley*, 9 F.R.D. 489 (S.D.N.Y. 1949).

impermissibly infringes upon defendants' ability to exercise their constitutional right to effective assistance of counsel by penalizing the exercise of that right.

It is precisely to protect against such an abuse of confidences—which cannot otherwise be monitored[21]—and to ensure that "no client should ever be concerned with the possible use against him in further litigation of what he may have revealed to his attorney,"[22] that disqualification of counsel is required under the prophylactic provisions of Canons 4 and 9 of the Code of Professional Responsibility.[23]

That is the situation presented here: having cooperated in the preparation of the joint defense to the previous criminal proceedings by exchanging confidential information, under protection of the attorney-client privilege and at the direction of Judge Regan, Shell and Amoco now find themselves facing an opponent making the same charges in a treble damage action—ten years later—who is represented by counsel who participated in that joint defense effort and who had access to their confidential information. The policies which require disqualification in the context of a direct attorney-client relationship also require it here.

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[21] The attorney-client privilege alone is obviously inadequate since it operates only to prevent further compelled disclosure but not to police the use of such information in the hands of opposing counsel in developing litigation strategy or planning discovery. *See, e.g., Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d at 571; *Chugach Elec. Ass'n* v. *United States District Court for the District of Alaska*, 370 F.2d 441, 443 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967).

[22] *T. C. Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953).

[23] Significantly, counsel's ethical obligations with respect to preservation of confidences extend far beyond the protection of the attorney-client privilege. ABA Code of Professional Responsibility, Ethical Consideration 4-4.

C. The Panel's Decision Threatens the Manabeability of Multi-Party Litigation.

The mischievous consequences of the panel's decision are not confined to one instance of threatened abuse of confidential communications. The standard established by the panel conflicts with the procedures established by the Judicial Panel on Multidistrict Litigation and will inevitably hamstring the conduct of multi-party litigation in which the exchange of confidential information among defense counsel is recognized as essential to the manageability of such cases. The Manual for Complex Litigation directs co-defendants to cooperate, to form joint committees and pool and exchange confidential data under the protection of the attorney-client privilege as a means of making complex cases manageable. §§ 1.92, 1.93.[24]

The panel's ruling collides head-on with both the rights of litigants in complex multi-party cases to prepare an effective defense and the ability of courts to manage and supervise such litigation. In the prior litigation there were 35 defendants named as co-conspirators who had allegedly violated the antitrust laws. Unless parties can reasonably be assured that confidential information exchanged among counsel for parties with a community of interest, under protection of the attorney-client privilege, will not return to haunt them in subsequent litigation in which the opposing party is represented by former counsel for co-defendants, no party can afford to engage in the type of cooperative effort upon which the conduct of such multi-defendant litigation so crucially depends.

Under the panel's ruling, litigants who are otherwise encouraged or, indeed, often directed by courts, to cooperate and exchange confidences will be faced with a

[24] Indeed, in the earlier criminal proceeding, Judge Regan ordered counsel for the 35 defendants to work in concert.

harsh dilemma: work together and exchange such information in preparing a common defense and, thereby, risk having it turned to one's disadvantage in a subsequent related case by an attorney who has switched sides or, refrain from such an exchange and thereby jeopardize one's ability to conduct an adequate defense. If defendants in complex cases refuse to exchange information and decline to cooperate by presenting joint positions, multi-party litigation cannot be managed.

The standard adopted by the Court of Appeals—proof of actual receipt of specific confidences rather than access to confidences—is improper. If a party satisfies the test by disclosing the specific confidences which had been exchanged, then the very purpose of the attorney-client privilege has been defeated. Public policy, as well as the client's private interest, require the rigid enforcement of the rule against disclosure. Moreover, explicit proof of actual receipt of confidences will seldom, if ever, be available to a party—certainly not ten years later. Key participants may die,[25] or forget the details of specific conversations.

Disqualification of opposing counsel who had access to confidential communications is the only practicable solution. Otherwise, in the end, the only real assurance a party can have that its confidences will not be abused will be to withhold information from its own counsel or instruct its counsel not to cooperate with counsel for co-defendants. The necessary result will be a debasement of the attorney-client relationship, a degradation in the quality of professional representation and the unmanageability of multi-party litigation.[26]

[25] Here, for example, John Hichew, Shell's counsel in the prior proceedings, is now deceased.

[26] The Department of Justice proposed Draft Bill Amending Rule 23, F.R. Civ. P., § 3021(b), provides that in multi-party litigation the court should seek to have the parties designate one

D. The Panel Ignored the Undisputed Evidence Which Establishes That the Lashly Firm Received Confidences of Shell and Amoco.

Even accepting the panel's improper standard, the undisputed evidence, described at pages 4-8 herein, demonstrates that members of the Lashly firm received confidences of Shell and Amoco. The Lashly firm's own billing statement to its client Kerr-McGee stated that it reviewed debriefing statements (App. 23a), but this was not even mentioned by the district court or the panel. Similarly, both the panel and the district court disregarded the nine month long grand jury investigation and instead treated the prior proceedings as though they consisted solely of an indictment followed by a rapid plea of *nolo contendere*. *Even under the standard established by the district court and panel*, the result achieved below could only be supported by a finding that there was no exchange of confidences during the nine-month period of the grand jury investigation—a finding which is conspicuously absent from the opinions below.

Likewise, the panel's finding that discussions during the period of the indictment and disposition of the criminal case involved "procedural" matters only (App. 13a) is contrary to the record. It is impossible to segregate arbitrarily discussions concerning substantive matters from those which involve "procedural" matters, as the Panel did here. In order for counsel to determine competently whether to advise his client to enter a plea of guilty or *nolo contendere*, or whether to file a bill of particulars, they must necessarily discuss the evidence in the case with counsel for other defendants. Mr. Coburn testified that in connection with the decision to change defendants' pleas from not guilty to *nolo con-*

attorney on each side to act as lead counsel. Co-counsel could not possibly agree to such designation if such counsel could one day switch sides, as here, and, represent another party in substantially related litigation against former co-defendants.

tendere, counsel for all parties did, in fact, discuss critical and confidential information.[27] There is no basis for the Panel's assumption that no matters of "substance" were discussed. Moreover, however the discussions are characterized, they would not have taken place in the presence of the Lashly firm had counsel for Shell and Amoco known that one day the Lashly firm would switch sides and sue their co-defendants in litigation they claim is substantially related to the prior criminal proceedings. Counsel agreed that their discussions were confidential. No further inquiry is necessary.

The Panel's decision must be reversed for its cavalier disregard of the evidence alone.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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March 17, 1978

[27] June 1, 1977 hearing, Tr., 24-25.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1311

SHELL OIL COMPANY, SHELL PIPELINE CORPORATION, AMERICAN OIL COMPANY, a/k/a AMOCO OIL COMPANY AND STANDARD OIL COMPANY (INDIANA),
Petitioners,

v.

FRED WEBER, INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
Opinion of the Court of Appeals	1a
Opinion of the Court of Appeals Denying Petition for Rehearing and Rehearing En Banc	15a
Opinion of the District Court for the Eastern District of Missouri	17a
Billing Statement of the Lashly Firm	23a

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 77-1571, 77-1599, 77-1616

FRED WEBER, INC.,
Appellee,

v.

SHELL OIL COMPANY, SHELL PIPE LINE CORPORATION,
AMOCO OIL COMPANY and
STANDARD OIL COMPANY (INDIANA),
Appellants.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: September 14, 1977

Filed: November 30, 1977

Before STEPHENSON and VAN OOSTERHOUT, Circuit Judges, and MARKEY,* Chief Judge.

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* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

MARKEY, Chief Judge.

Appeal from an order of the United States District Court for the Eastern District of Missouri, 432 F. Supp. 694 (E.D. Mo. 1977), denying defendants' motion to disqualify plaintiff's counsel. We affirm.

Background

Among the defendants in the present civil antitrust suit are Shell Oil Company (Shell) and American Oil Company (Amoco), which seek the disqualification of Lashly, Caruthers, Thies, Rava & Hamel (the Lashly firm) as counsel for plaintiff Fred Weber, Inc. (Weber).

The Lashly firm was counsel for some of Shell and Amoco's codefendants in a prior criminal antitrust suit, *United States* v. *American Oil Co.*, 65 C.R. 150(3), brought in 1965. Shell and Amoco are represented here by the attorneys who represented them in the prior suit. That suit terminated in November 1965 when Judge Regan accepted pleas of *nolo contendere* from all defendants.

Judge Regan, the judge in *American Oil*, recused himself from the present suit on his own motion, in accord with the ABA Code of Judicial Conduct, Canon 3C(1)[1] and 28 U.S.C. § 455.[2] Order of December 10, 1976. One month later, and eight months after being sued for conspiracy to violate the antitrust laws in the present suit, Shell and Amoco filed their motion to disqualify the Lashly firm in view of Canons 4, 5, and 9 of the ABA Code of Professional Responsibility.[3]

[1] Canon 3C(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . .

[2] 28 U.S.C. § 455(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Shell and Amoco allege that members of the Lashly firm, by reason of their representation in *American Oil*, had access to confidential information (debriefing memoranda of grand jury testimony) in the files of Amoco's counsel, and were present at meetings of counsel for all defendants at which defense strategy was discussed. The Lashly firm contends that it never represented Shell or Amoco in the criminal suit; that it never received confidential information; that, absent proof of receipt of confidential information, disqualification is not warranted; that there is no appearance of impropriety; and that the motion is one of a series of delaying tactics.

Judge Nangle, to whom the case was reassigned, ordered Shell and Amco to file *in camera* "any and all material in their possession which support[s] the allegations made in their motion to disqualify plaintiff's attorney . . . [and] written affidavits setting out all confidences which were exchanged during the pendency of *United States* v. *American Oil Company* . . ." Order of April 20, 1977.

After a hearing, Judge Nangle held that the evidence, including the *in camera* submissions, testimony, affidavits of counsel, and other submissions, established that counsel for the criminal defendants did agree to work together in their defense of the indictment, but that no member of the Lashly firm had represented Shell or Amoco or had received any confidential information. 432

[3] Canon 4. A lawyer should preserve the confidences and secrets of a client.

Canon 5. A lawyer should exercise independent professional judgment on behalf of a client.

Canon 9. A lawyer should avoid even the appearance of professional impropriety.

F. Supp. at 696. The motion to disqualify was therefore denied.

Scope of Review

We apply the scope of review in disqualification cases described in *Hull* v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975): "The district court bears the responsibility for the supervision of the members of its bar. [Citing authorities.] The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place. [Citing authorities.]" 513 F.2d at 571.

Issues

The dispositive issues on appeal are: (1) whether the order denying the motion is separately appealable, and (2) whether the district court abused its discretion in refusing the disqualification of the Lashly firm in view of Canon 4, 5, or 9 of the Code of Professional Responsibility.[4]

OPINION

The question before us is one of first recorded impression: Does a lawyer's representation of A, co-defendant with B in a prior suit, disqualify the lawyer as representative of C against B in a subsequent, related suit?

[4] Judge Nangle found it "beyond dispute" that the prior criminal suit and the present civil litigation are substantially related, and denied appellants' request to revise that finding to merely state that appellee "claimed" such relationship. What appellee *claims* is irrelevant. That the matters be related is a necessary element of appellants' position on the motion to disqualify, as stated in opinions quoted in appellants' brief. Appellants have not requested that this court hold the finding clearly erroneous (nor could they), but only that we refrain from adjudicating the issue. There is no such "issue" before us. Either the matters are related or they are not. If they are not, the motion is and was groundless. It would be an abuse of the judicial process if counsel were to get his adversary disqualified because of representation in a related matter, and then deny that the matter was in fact related.

(1) *The order denying the motion to disqualify is immediately appealable.*

Appeals in federal cases being governed by 28 U.S.C. § 1291 (1958) and 28 U.S.C. § 1292 (1958),[5] appeals prior to final judgment below are commonly sought through the "collateral order" exception to the § 1291 "finality" requirement, created by the Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S.

[5] § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 1292. Interlocutory decisions.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

* * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

541 (1949).[6] An order is appealable under *Cohen* when: (1) it is a "final determination of a claim of right 'separable from, and collateral to,' the rights asserted in the main action;" (2) it presents "'a serious and unsettled question,' rendering it 'too important to be denied review'"; and (3) an immediate appeal is "necessary to preserve rights that would otherwise be lost on review from final judgment." *Community Broadcasting of Boston, Inc.* v. *Federal Communications Commission*, 546 F.2d 1022 at 1025 (DC Cir. 1976).

Courts have distinguished between the granting and denying of motions to disqualify counsel. Orders granting such motions have long been considered immediately appealable under *Cohen*. *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976). The circuits disagree on appealability of orders denying motions. The Second, Third, Fifth, Sixth, Seventh and Tenth Circuits have held that orders denying motions to disqualify meet the requirements of *Cohen*. *Silver Chrysler I, supra* note 6 (overruling prior contrary decisions); *Greene* v. *Singer Co.*, 509 F.2d 750 (3rd Cir. 1971); *Tomlinson* v. *Florida Iron & Metal, Inc.*, 291 F.2d 333 (5th Cir. 1961); *Melamed* v. *ITT Continental Baking Co.*, 534 F.2d 82 (6th Cir. 1976); *Schloetter, supra; Fullmer* v. *Harper*, 517 F.2d 20 (10th Cir. 1975). The D.C. Circuit has held the contrary. *Community Broadcasting, supra.* The Ninth

[6] Section 1292(a)(1) provides for appeals from interlocutory orders refusing injunctions. Although often phrased as injunctions against further participation in a suit, the disqualification of counsel is not considered an injunction in determining appealability. *Fleisher* v. *Phillips*, 264 F.2d 515, 516 (2nd Cir. 1959), *cert. denied* 359 U.S. 1002 (1959) (overruled on other grounds), *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2nd Cir. 1974) (Silver Chrysler I); *Cord* v. *Smith*, 338 F.2d 516, 521 (9th Cir. 1964), *clarified* 370 F.2d 418 (9th Cir. 1966). Appeal under § 1292(b), discretionary with the district and appellate courts, is uncertain in result and not generally used. See *Silver Chrysler I, supra.*

Circuit, with no mention of *Cohen*, has held denial of the motion reviewable by writ of mandamus, but not appealable. *Cord, supra.*

The disagreement is over the adequacy of review after final judgment, *Community Broadcasting, supra*, and *Silver Chrysler I, supra* note 6, are representative. In *Community Broadcasting*, the court said: "Although 'collateral' to the main proceeding, an order denying a motion to disqualify does not, in most cases, implicate any claim of right that will be irreparably lost on appeal from final judgment." 546 F.2d at 1028. The D.C. Circuit also expressed the view that "[a] rule allowing interlocutory appeals here would provide litigants with yet another device by which to delay final determination on the merits, and would lead the court to divert its attention from the central issues in the case." 546 F.2d at 1027 (footnote omitted). The court in *Silver Chrysler I* adopted the language and decision of the Supreme Court in *Cohen*: "'We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.' 337 U.S. at 547." 496 F.2d at 805-06. The Second Circuit was influenced by its feeling that "[t]here is no sufficient basis for distinguishing between . . . [orders granting and denying disqualification]. In both situations the order is collateral to the main proceeding yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief." 496 F.2d at 805.

We hold that the order denying disqualification is final under *Cohen* and therefore appealable. The question involved is separable from and collateral to the main action; it is serious, and too important to await review in conjunction with the appeal from a final judgment. We recognize the obvious risk that an immediate appeal may be used for delay and diversion. On balance, however,

we consider the risk insufficient to warrant an insistence that trials be conducted under a cloud of potential disqualification. Moreover, disciplinary powers of courts are available to deal with unfounded motions to disqualify and frivolous appeals from their denial.

(2) *Disqualification is not required by Canon 4, 5 or 9.*

Canon 4

Though Canon 4 is an exemplary rule dealing with a particular relationship, the lawyer's personal relationships to others are incapable of comprehensive codification. The broad commitment of the lawyer to respect confidences reposed in him is his talisman. Touching the very soul of lawyering, it rests upon a "privilege" which is that of the client, not that of the lawyer. Inaccurately described as the "lawyer's privilege against testifying," the privilege of clients to bind their lawyers to secrecy is universally honored and enforced as productive of social values more important than the search for truth. Canon 4 is designed to preserve the trust of the client in his lawyer, without which the practice of law, whatever else it might become, would cease to be a profession.

Because Canon 4 is limited by its language to the duty of the lawyer to his client, *International Electronics Corp.* v. *Flanzer*, 527 F.2d 1288 (2d Cir. 1975), one who seeks to employ Canon 4 to disqualify opposing counsel must show that counsel to have, or to have had, an attorney-client relationship with an adverse party in the present suit.[7]

[7] The movant must also show (as here) that "the matters involved in the pending suit in which his former attorney represents his adversary are substantially related to the matters or cause of action in which the attorney previously represented him. . . ." *American Can Co.* v. *Citrus Feed Co.*, 436 F.2d 1125, 1128 (5th Cir. 1971) (speaking of former Canons 6 and 37, the predecessors of Canon 4).

The movants in *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976), established an attorney-client relationship by proving they had engaged the attorney whose disqualification was sought. The court in *Continental Oil Co.* v. *United States*, 330 F.2d 347 (9th Cir. 1964), found an attorney-client relationship in the advice and representation provided certain parties. It is not here contended or shown that members of the Lashly firm were engaged by, or advised or represented, Shell or Amoco in the prior antitrust suit. The evidence supports the finding of the district court that neither Shell nor Amoco was ever a client of the Lashly firm. Canon 4 is therefore inapplicable.

In reliance on Canon 4, Shell and Amoco argue unnecessarily that the Lashly firm had "access" to confidential information. The attorney-client relationship raises an irrefutable presumption that confidences were disclosed. *In re Yarn Processing*, 530 F.2d at 89. Further, the presumed access of a partner to confidential information results in imputation of that information to others in his firm. *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures, Inc.*, 224 F.2d 824 at 827 (2nd Cir. 1955). The presumption is an absolute necessity if the goal sought by Canon 4 is to be achieved. Indeed, a failure to apply the presumption in attempted disqualification cases would impinge upon, if not destroy, the underlying client's privilege against disclosure of the information imparted in confidence to his lawyer:

> [T]he court need not, indeed cannot, inquire whether the lawyer did, *in fact*, receive confidential information during his previous employment which might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would

necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved. [*Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 at 571 (1973).]

Absent an attorney-client relationship, no court has applied the presumption inherent in Canon 4. Shell and Amoco's reliance on *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128 (2d Cir. 1976) and *Hull*, *supra*, for the proposition that an attorney-client relationship is not required for application of Canon 4, is unavailing. In those cases, in-house counsel for the corporate defendants switched sides; in the former by becoming co-counsel of plaintiff's attorney; in the latter by becoming a plaintiff in the suit and retaining the original plaintiff's attorneys. In-house counsel in both cases were presumed to have received information from their former corporate clients, and that information was imputed to the attorneys with whom in-house counsel became associated.

Canon 5

Canon 5 deals with professional zeal. The term "client" in Canon 5 identifies the beneficiary of that zeal. The Canon is broad enough to preclude simultaneous representation of conflicting interests (Ethical Consideration 5-14 of Canon 5) and the use of information against someone who, reposing confidence in the lawyer, supplied that information to the lawyer's client,[8] and to encompass similar ethical considerations involved in the lawyer's exercise of his professional judgment.

The evidence here reflects no failure of compliance with Canon 5, or potential for such failure, on the part of the Lashly firm. Nothing of record indicates an impediment to the exercise of independent professional judgment by the Lashly firm on behalf of its present client, Weber;

[8] H. Drinker, Legal Ethics 106 (1965).

nothing indicates the presence of conflicting interests; nothing indicates that Shell or Amoco, or anyone else, supplied information to Weber, whether in confidential reliance on the Lashly firm or otherwise.

Canon 9

Unlike those of Canons 4 and 5, the broad injunction of Canon 9 against the "appearance of impropriety" relates to the entire spectrum of lawyer conduct. That no unethical or untoward act may have occurred is implicit in the canon's emphasis on "appearance." The conduct under scrutiny must therefore be evaluated in an "eye of the beholder" context, and the lawyer must be disqualified when an actual appearance of evil exists, though there be no proof of actual evil.

Would a member of the public, or of the bar, see an "impropriety" in the mere representation of C against B by a lawyer who had represented B's codefendant in a related prior suit? We think not. The public and the bar are aware that particular lawyers have specialized in certain areas of the law and that their number is limited within specific geographical limits. It would be neither surprising nor unexpected that the same lawyer would appear for plaintiffs and defendants, and that a present adverse party may have been on the other side in a prior case. To hold that every representation against a former client's codefendant in a related matter raises an appearance of impropriety would unnecessarily restrict the choice of counsel available to litigants.

Nor will we presume the lack of integrity involved in a knowing acceptance of representation against a party from whom, or about whom, confidential information had been obtained. If a presumption of integrity, which should be the proud and earned possession of every lawyer, has been destroyed by recent renowned conduct of

some members of the bar, it is neither yet necessary, nor socially advantageous, to substitute a presumption of non-integrity.

As was said in *Woods* v. *Covington County Bank*, 537 F.2d 804 (5th Cir. 1976):

> It does not follow, however, that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public. Inasmuch as attorneys now commonly use disqualification motions for purely strategic purposes, such an extreme approach would often unfairly deny a litigant the counsel of his choosing. Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary. . . . Consequently, while Canon 9 does imply that there need be no proof of actual wrongdoing, we conclude that there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur. [537 F.2d at 813 (footnotes omitted).]

Of itself, representation of a codefendant of B raises no presumption that the lawyer obtained confidential information detrimental to B's interests. Nor may confidential information which B may have imparted to its counsel be imputed to the lawyer. The relationship between individual counsel for separate codefendants differs in structure and function from the relationship between partners in a law firm and from the relationship between co-counsel for a single party. Applicability of Canon 9 thus turns on a fact question: Did the Lashly firm obtain confidential information in the course of representing a co-defendant of Shell and Amoco in the prior suit?

The prior criminal action never went to trial. The joint application of all codefendants for change of plea to *nolo contendere* was filed one month after arraignment, with no intervening motions. The record here reflects no preparation of a substantive defense. Discussions among counsel, in which members of the Lashly firm participated, concerned only procedural matters. The memorandum in support of the change of plea was based on legal, not factual matters. Our study of the record, including the *in camera* submissions, persuades us that the Lashly firm obtained no confidential information in the course of representing the former codefendant of Shell and Amoco. The prompt disposal of the earlier suit on a purely procedural basis and the limited discussions among counsel for the defendants convinces us that no basis exists for presuming that confidential information was obtained which presumption would in turn serve as the genesis of an appearance of impropriety.[9] Absent such presumption, the burden of showing an actual imparting of confidential information was upon Shell and Amoco, which have not met that burden on this record.[10]

In the circumstances of this case, refusal to disqualify the Lashly firm is not seen as giving scandal to the profession; or as risking injury to its integrity and honor; or as discouraging public respect for the law or the courts; or as disabling the confidence, respect and trust which underpin the profession; or as limiting the public trust of Canon 9 or its guardianship over the reputation of the lawyer and his profession.

---

[9] We need not decide whether an appearance of impropriety might be created by prior representation of a codefendant, where a full, substantive defense was jointly prepared and presented in a completed trial, or whether such representation might shift the burden of proof to the challenged lawyer.

[10] Shell and Amoco point to the self-disqualification of Judge Regan, but that disqualification turned on the appearance of partiality, not impropriety. The Lashly firm, as an advocate, is not expected to be impartial.

Conclusion

The district court's findings of fact were not clearly erroneous, and its refusal to disqualify the Lashly firm was not an abuse of discretion. Accordingly, the order of the district court is affirmed.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977

77-1571

FRED WEBER, INC.,
Appellee,

vs.

SHELL OIL COMPANY, et al.,
Appellants.

77-1599

FRED WEBER, INC.,
Appellee,

vs.

SHELL OIL COMPANY, et al.,
Appellants.

77-1616

FRED WEBER, INC.,
Appellee,

vs.

STANDARD OIL COMPANY (INDIANA), et al.,
Appellants.

Appeals from the United States District Court
for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for Shell Oil Company and Shell Pipeline Corporation and petition for rehearing en banc filed by counsel for Standard Oil Company and Amoco Oil Company and, being fully advised in the premises,

it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

December 28, 1977

UNITED STATES DISTRICT COURT
E.D. MISSOURI, E.D.

No. 75-1115C(4)

FRED WEBER, INC.,
Plaintiff,

v.

SHELL OIL COMPANY, SHELL PIPELINE CORPORATION, STANDARD OIL COMPANY, AMERICAN OIL COMPANY, a/k/a AMOCO OIL COMPANY,
Defendants.

June 16, 1977

MEMORANDUM AND ORDER

NANGLE, District Judge.

This matter is before the Court upon the motion of defendants Shell Oil Company and Amoco Oil Company to disqualify plaintiff's attorney. Plaintiff has filed this suit alleging violations of the Sherman and Clayton Acts, and additionally asserting claims of misrepresentation and unconscionability. Plaintiff's attorney is Edward Weakley and the firm, Lashly, Caruthers, Thies, Rava & Hamel.

In 1965, a criminal suit was brought, *United States* v. *American Oil Company, et al.*, D.C., 264 F. Supp. 93, and concluded upon the entry of pleas of nolo contendere. Included among the thirty-five defendants in that suit were the movants herein. It appears from the files in that suit, and it is undisputed herein, that both Paul Rava and John Lashly, presently of Lashly, Caruthers, Thies, Rava & Hamel, represented parties named as defendants in the criminal suit. In addition, Kenneth Thies, who is deceased, and Rexford H. Caruthers represented

defending parties in the criminal suit. None of the members of the firm of Lashly, Caruthers, Thies, Rava & Hamel represented any of the defendants named in the instant suit.

At the time of the criminal suit, John Lashly and Paul Rava were associated with the firm of Lashly, Lashly, Rava, Hyndman & Rutherford. Rexford H. Caruthers, then associated with Guilfoil, Caruthers, Symington & Montrey, joined the Lashly firm in 1968. Kenneth Thies, then associated with Kerth, Thies & Schreiber, joined the Lashly firm in 1973.

Moving defendants herein contend that there was a joint defense conducted in the criminal suit and that members of the Lashly firm had access to confidential information.

The record of events in the criminal suit establish that the indictment was returned on July 22, 1965 and summons were issued returnable on September 8, 1965. On September 8, 1965, all defendants appeared in court and entered pleas of not guilty. On October 6, 1965, defendants filed an application for change of plea. On November 19, 1965, pleas of nolo contendere were accepted. It is beyond dispute that the criminal suit and the present civil litigation are substantially related.

The evidence establishes that counsel for the criminal defendants did agree to work together in their defense of the indictment. It appears that various defense committees were established in connection with the criminal suit and that certain debriefing memoranda of grand jury witnesses were available for viewing by counsel for defendants. It also appears that a committee was established for amassing relevant documents although the evidence as to the results of that committee's efforts indicates that no documents were collected. There is no evidence that any member of the firm of Lashly, Caruthers,

Thies, Rava & Hamel availed himself of the opportunity to review the memoranda, nor did any member receive any other confidential information from any of the other defendants in the criminal suit. Both Mr. Rava and Mr. Lashly testified that they did not review any of the debriefing memoranda nor receive any other confidential information. A number of other defense attorneys also did not avail themselves of the opportunity to review the information collected. A motion requesting leave to enter pleas of nolo contendere was circulated to all counsel and eventually was filed on behalf of substantially all defendants. That motion was, of course, a matter of public record, and further, contained no confidential information.

Canon 9, American Bar Association's Code of Professional Responsibility, requires that "a lawyer . . . avoid even the appearance of professional impropriety". Canon 4 requires that an attorney not divulge the confidences of clients.

An attorney will be disqualified from representing a party whose interests are adverse to a former client's interests where the subject of the litigation is substantially related to the former representation. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 518 F.2d 751 (2d Cir. 1975); *Redd* v. *Shell Oil Company*, 518 F.2d 311 (10th Cir. 1975); *Emle Industries, Inc. (Glen Raven Mills, Inc.)* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *American Can Company* v. *Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971); *Chugach Electric Association* v. *United States District Court for District of Alaska at Anchorage*, 370 F.2d 441 (9th Cir. 1967), *cert. denied*, 389 U.S. 820, 88 S.Ct. 40, 19 L.Ed.2d 71 (1967); *Cannon* v. *U.S. Acoustics Corporation*, 398 F.Supp. 209 (N.D. Ill. 1975), *modified*, 532 F.2d 1118 (7th Cir. 1976); *Motor Mart, Inc.* v. *Saab Motors, Inc.*, 359 F.Supp. 156 (S.D.N.Y. 1973);

Estates Theatres, Inc. v. *Columbia Pictures Industries, Inc.*, 345 F.Supp. 93 (S.D.N.Y. 1972); *T. C. Theatre Corporation* v. *Warner Bros. Pictures, Inc.*, 113 F.Supp. 265 (S.D.N.Y. 1953).

In the present case, however, neither plaintiff's attorney nor any member of the firm of Lashly, Caruthers, Thies, Rava & Hamel represented any of the defendants herein; defendants were never clients of plaintiff's attorney or the firm. Defendants contend that because a joint defense was allegedly conducted in the criminal suit, defendants were, for the purposes of the Canons of Ethics, at least, clients of the firm during the criminal proceedings. *Cf.*, *Hunydee* v. *United States*, 355 F.2d 183, 185 (9th Cir. 1965) (court excluded evidence on the basis that it was protected by the attorney-client privilege stating that ". . . where two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings."); *Continental Oil Company* v. *United States*, 330 F.2d 347 (9th Cir. 1964) (holding privileged from grand jury subpoena grand jury debriefing memoranda shared with counsel of targets of grand jury investigation). These cases, however, do not stand for the proposition which defendants apparently assert; they do not hold that there is an irrebuttable inference from the conduct of a joint defense that confidences were shared which bars subsequent representation. The cases simply hold that confidences which are in fact shared remain privileged. The evidence herein failed to establish that any confidences were revealed.

In *International Electronics Corp.* v. *Flanzer*, 527 F.2d 1288 (2d Cir. 1975), the court noted the increase in the

number of attempts to disqualify counsel. While representation in violation of the Canons of Ethics will not be tolerated in this Court,

> A court should be conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, which include the litigant's right to freely chosen counsel. *Woods* v. *Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976).

In order to disqualify plaintiff's counsel, the Court would have to infer, from the agreement that defense counsel would work together in the criminal suit, that confidences were shared, and that these confidences were then revealed to the members of the firm of Lashly, Caruthers, Thies, Rava & Hamel. The Court refuses to take these steps in light of the evidence.

In *Silver Chrysler Plymouth, Inc.*, *supra* at 754, the court noted:

> . . . while this Circuit has recognized that an inference may arise that an attorney formerly associated with a firm himself received confidential information transmitted by a client to the firm, that inference is a rebuttable one.

This same standard, that of a rebuttable inference, should apply where it is alleged that counsel acted in concert in pursuing a joint defense. In the present case, the evidence fails to establish that the firm of Lashly, Caruthers, Thies, Rava & Hamel received any confidential information. Accordingly, the inference that confidential information was shared is rebutted. *Cf.*, *T. C. Theatre Corporation* v. *Warner Bros. Pictures, Inc.*, *supra* at 271, wherein the court held that the evidence failed to establish that an attorney's conferences with defendants' coun-

sel involved disclosure of confidential information, and that absent such evidence, disqualification was not warranted.

Accordingly,

IT IS HEREBY ORDERED that the motion of defendants Shell Oil Company and Amoco Oil Company to disqualify plaintiff's attorney be and is denied.

LASHLY, LASHLY, RAVA, HYNDMAN & RUTHERFORD

Jacob Mark Lashly
John H. Lashly
Paul B. Rava
Elihu Hyndman
William I. Rutherford
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LAWYERS
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December 7, 1965

Lashly, Lashly & Miller
Formerly

Arthur K. Lashly
1880-1957

Kerr-McGee Corporation
Kerr-McGee Building
Oklahoma City, Oklahoma 73102

To LASHLY, LASHLY, RAVA, HYNDMAN & RUTHERFORD

Re: U.S. v. American Oil Company, et al.

For services rendered from September 1, 1965 to date:

Conferences with Carson M. Glass and Lynn Adams on numerous occasions; *review of debriefing statements as applied to Kerr-McGee and Mr. Jack H. Mitchell*; library research on the question of acceptability of a plea of nolo contendere; collection of material and preparation of statements for the company and Mr. Mitchell in support of the application for change of plea to nolo contendere and in mitigation; three informal pre-trial conferences with Judge Regan, *one as a member of the Committee of counsel for all defendants* and two personal to the clients; appearance in court on October 22 and November 19; preparation and filing of probation report for

Mr. Mitchell; research on and drafting of suggestions concerning change of name from Kerr-McGee Oil Industries, Inc. to Kerr-McGee Corporation and obtaining court Order adopting same; numerous telephone conversations with Carson Glass and Lynn Adams; *numerous telephone conversations with other counsel for defense,* Mr. Hunter of Department of Justice, and miscellaneous inter-office conferences in person and by telephone; *attendance at meetings of defense counsel and exchange of correspondence with such counsel* and the clients from time to time throughout the period September 1, 1965 to date (Emphasis added.)	$5,000,00
Out-of-Pocket Expenses (Statement attached)	86.56
	$5,086.56

Supreme Court, U. S.
FILED
APR 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1311

SHELL OIL COMPANY, SHELL PIPELINE CORPORATION, AMOCO OIL COMPANY and STANDARD OIL COMPANY (INDIANA),

Petitioners,

v.

FRED WEBER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

Fred Weber, Inc. in Opposition

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Rules Involved	2
Statement of the Case	3
A. Preliminary Statement	3
B. Proceedings Below	5
Reasons for Denying the Writ	12
A. There Is No Conflict With the Decisions of the United States Court of Appeals for the Second Circuit	12
B. The Trial Court Correctly Found That No Member of the Lashly Firm Received Any Confidential Information From Any of the Other Defendants in United States v. American Oil Co., et al. This Finding of Fact Is Not Clearly Erroneous	18
C. Petitioners' Circular Argument Concerning Claimed Confidences	20
D. Petitioners' Unfounded Innuendos	20
Conclusion	20

Statutes and Authorities

Cases

Abraham Construction Corp. v. Armco Steel Corp., 559 F.2d 250 (5th Cir. 1977) 14, 15

Akerly v. Red Barn System, Inc., 551 F.2d 539 (3d Cir. 1977) 19

Allied Realty of St. Paul, Inc. v. Exchange National Bank of Chicago, 408 F.2d 1099 (8th Cir. 1969) 19
American Can Company v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971) 12, 13, 21

Chugach Electric Association v. United States District Court for the District of Alaska, 370 F.2d 441 (9th Cir. 1966), cert. denied 389 U.S. 820 (1967) 12
Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954) 12, 13
Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964) 20

Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) 12

Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977) 14, 15, 16, 18

Gas-A-Tron of Arizona v. Union Oil Company of California, et al., 534 F.2d 1322, 1325 (9th Cir. 1976) ..12, 13
Grand Jury Subpoena Duces Tecum, 406 F.Supp. 381 (S.D.N.Y. 1975) 20

Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975) 14, 15, 16, 18, 19
Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965) .. 20

Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc., et al., 224 F.2d 824 (2d Cir. 1955) 12, 13, 16, 17, 18

NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976) 14, 15, 16, 18

Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976) 13
Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975) 13, 17, 18

United States v. American Oil Co. et al., 65 CR 150(3) (1965) 3-4, 5, 8, 9, 14, 18, 22
United States v. United States Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948) 19

W. E. Bassett Co. v. H. C. Cook Co., 201 F.Supp. 821 (D. Conn. 1962) 13, 16
Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976) 17

Statutes and Rules

American Bar Association's Code of Professional Responsibility:
Canon 4 .....2, 12
Canon 5 2
Canon 9 .....2, 17
"Representation of Interest Adverse to That of a Former Client," 55 Boston University Law Review 61 (1975) ..21-22

Rule 52(a), F.R.C.P. 19

28 U.S.C. § 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1311

SHELL OIL COMPANY, SHELL PIPELINE CORPORATION, AMOCO OIL COMPANY and STANDARD OIL COMPANY (INDIANA),

Petitioners,

v.

FRED WEBER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT
Fred Weber, Inc. in Opposition

Respondent Fred Weber, Inc. respectfully prays that the writ of certiorari sought by petitioners be denied.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eighth Circuit, 566 F.2d 602 (8th Cir. 1977) and the United States District Court for the Eastern District of Missouri, 432 F.Supp. 694 (E.D. Mo. 1977) are correctly cited and reproduced in petitioners' Appendix.

JURISDICTION

Petitioners correctly invoke 28 U.S.C. 1254(1), and the petition for certiorari is timely filed.

QUESTIONS PRESENTED

I. Does a lawyer's representation of A, co-defendant with B in a prior suit, disqualify the lawyer as representative of C against B in a subsequent related suit?

II. Does a lawyer's representation of A, co-defendant with B in a prior suit, disqualify the lawyer as a representative of C against B in a subsequent related suit, where there is no evidence that he in fact received any confidential communication from B or B's lawyer in the prior suit and where there is direct evidence and a finding of fact that he did not receive any such confidential communication?

III. In the situation described in question II is the District Court's finding that no confidential communication was received by A's lawyer or the District Court's denial of a motion to disqualify to be disturbed on an interlocutory appeal as "clearly erroneous" or as "an abuse of discretion?"

RULES INVOLVED

Petitioners rely on Canons 4 and 9 of the American Bar Association's Code of Professional Responsibility. Petitioners have correctly abandoned their claims under Canon 5.* [Pet. Append., pp. 3(a) and 10(a)].

---

* Canon 4 provides:

"A lawyer should preserve the confidences and secrets of a *client*." (emphasis supplied)

Canon 5 provides:

"A lawyer should exercise independent judgment on behalf of a *client*." (emphasis supplied)

Canon 9 provides:

"A lawyer should avoid even the appearance of professional impropriety."

STATEMENT OF THE CASE

A. Preliminary Statement

This is an appeal by Shell Oil Company and Shell Pipe Line Company (hereinafter "Shell") and Standard Oil Company (Indiana) and Amoco Oil Company (hereinafter "Standard"),[1] from the Order of the United States District Court for the Eastern District of Missouri, The Honorable John F. Nangle, denying their motion to disqualify Lashly, Caruthers, Thies, Rava & Hamel (hereinafter the "Lashly firm"), a St. Louis law firm, as attorneys for plaintiff-respondent, Fred Weber, Inc. The United States Court of Appeals for the Eighth Circuit affirmed and Shell and Standard petitioned this Court for a writ of certiorari.

Suit was filed by Fred Weber, Inc. December 8, 1975. The issues on the merits are framed by the Amended Complaint filed May 3, 1976 which contains allegations that the defendant oil companies conspired and monopolized concerning the price of penetration grade asphalt oil, the essential petroleum ingredient in hot asphalt mix. Large parallel price increases, including price increases from $25 per ton to $65 per ton during the period 1974, 1975 and 1976, are alleged. Violations of the Robinson-Patman Act, unconscionable pricing and fraud are also charged.

Shell and Standard[2] contend that the Lashly firm should be disqualified because of claimed receipt of confidential communications allegedly arising out of the Lashly firm's earlier representations of co-defendants of Shell and Amoco in *United*

---

[1] Shell Pipe Line Company is a wholly owned subsidiary of Shell Oil Company. Amoco Oil Company is a wholly owned subsidiary of Standard Oil Company (Indiana).

[2] The motion to disqualify the Lashly firm was filed in the District Court by Shell Oil Company and Amoco Oil Company, which was formerly named American Oil Company.

States v. American Oil Co. et al., 65 CR 150(3) (1965) thirteen years ago. *Nolo contendere* pleas were entered in that case by all 33 defendants in 1965 on an indictment for price fixing and division of territories with respect to sales of asphalt cutbacks to the State of Missouri. Members of the Lashly firm represented several defendants, but not Shell or Amoco (then American Oil Company).

The thrust of Shell's and Standard's claim is that John H. Lashly and Paul B. Rava of the Lashly firm served on defense committees in the earlier criminal case and had "access" to certain undescribed information from co-defendants in the 1965 case which is alleged to have been confidential; and that the entire Lashly firm should therefore be disqualified.

There is an irrebuttable presumption that a lawyer who has had "access" to confidences from his former client has received such confidences. The District Court denied the motion to disqualify and the Court of Appeals affirmed on the ground that the presumption of confidential communication which arises from a former attorney-client relationship does not apply as between counsel for co-defendants in a prior case; that since no member of the Lashly firm had ever represented Shell or Amoco there is no presumption of confidential communication; and that there was in fact no confidential communication received by any member of the Lashly firm. No evidence of any such confidential communication was introduced. Mr. Lashly and Mr. Rava of the Lashly firm denied receiving any such communications.

The Court of Appeals correctly characterized the case as "one of first impression." There is no conflict with the decisions of any circuit. The case was decided both in the District Court and in the Eighth Circuit upon settled principles of law which have governed motions to disqualify for decades.

B. **Proceedings Below**

On January 10, 1977, the motion to disqualify the Lashly firm was filed by defendants Shell Oil Company and Amoco Oil Company. They filed supplemental submissions February 25, 1977, March 14, 1977 and March 25, 1977. The motion describes no confidences secured by any member of the Lashly firm. The supplemental submissions describe no such confidence.

On April 20, 1977, the trial judge ordered counsel for Shell and Amoco to file *in camera* any and all material in their possession supporting the allegations made in their motion to disqualify. In addition, he ordered affidavits to be filed by both parties, which were to set out "all confidences" exchanged during the pendency of the earlier criminal case in 1965. Shell and Amoco resisted these orders. Their request for vacation of the orders was denied May 5, 1977.

Evidently a number of documents were filed by Shell and Amoco *in camera*. These documents have never been viewed by counsel for Fred Weber, Inc.

The motion to disqualify was heard on June 1 and June 3, 1977. Evidence was adduced, and exhibits were submitted (Tr. 1, 80).

Th evidence was that an indictment was returned in *United States v. American Oil Co. et al.*, No. 65 CR 150 (3) on July 22, 1965, against 16 corporate defendants and 17 connected individuals (Tr. 82). It was the result of a grand jury investigation commenced in the fall of 1964 (Tr. 96). Shell and Amoco (then American Oil Co.) were defendants. No present or former member of the Lashly firm represented Shell or Amoco in that proceeding (Tr. 125, 126, 127). This is conceded by Shell and Amoco on pages 14 and 33 (n.36) of their brief before the Eighth Circuit. No present or former member of the Lashly firm has ever represented Shell or Amoco in any matter at any time (Tr. 126, 127).

The indictment in the 1965 case charged that "beginning sometime in 1960 and continuing thereafter through at least 1963 * * *" defendants engaged in a conspiracy to suppress and eliminate competition in the sale of "cut-back asphalt" in and to the State of Missouri. It further charged that the defendants, among other things:

> "(c) Discussed and distributed among themselves what was sometimes referred to by the defendants and co-conspirators, as the 'scoresheet' or 'bible', which contained agreed-upon prices applicable to each of the 114 Missouri counties; and
>
> "(d) Discussed and agreed that each defendant and co-conspirator bidder would bid below the agreed-upon prices as shown on the 'score sheet' or 'bible' for sales on which it was to be the low bidder and bid at or above such prices for sales on which it was not to be the low bidder." (Indictment, para. 15)

At the hearing before Judge Nangle, petitioners presented one witness, Mr. Richmond C. Coburn, who at the time of the criminal trial represented Amoco and who also represents Amoco in the instant case. Witnesses called by plaintiff were Hon. William H. Webster (then Judge of the Court of Appeals of the Eighth Circuit and now Director of the Federal Bureau of Investigation), Mr. Robert Allen, partner in the firm of Lewis, Rice, Tucker, Allen & Chubb, Mr. John H. Lashly, and Mr. Paul B. Rava, partners in the Lashly firm.

In 1965, Mr. Allen represented Missouri Petroleum Company, a corporate defendant and Judge Webster represented Mobil Oil Corporation, also a corporate defendant. Messrs. Lashly and Rava represented Kerr-McGee Oil Company, Riffe Petroleum Company and other individual defendants connected with them and with Missouri Petroleum Company.

Not until August 16, 1965, approximately one month after the indictment was issued were any defense committees formed (Tr. 14, 15).

Mr. Rava was named a member of the Committee on Documents on August 17, 1965, by Mr. Coburn (Tr. 90, 91). No documents were collected (Tr. 90, 91). The District Court so found. 432 F.Supp. 694, 696.

Meetings alleged to have taken place (Pet. for Writ of Cert., p. 5) were the subject of testimony by both Mr. Allen and Judge Webster.

Mr. Allen stated:

> "* * * I don't recall attending any meeting of counsel before the indictment. But I remember that there was this matter of lawyers, there must have been 50 in the room, and perhaps I'm—from my experience, I'm a skeptic about meetings of lawyers, particularly when they are that large, they seldom, if ever, accomplish anything, and don't recall certainly anything that I considered of a confidential nature being disclosed at one or more meetings that I attended." (Tr. 43)
>
> "* * * No, and I didn't look at anyone else's, nor did I look at any documents, nor did I supply any documents. At these meetings that I attended of meetings of counsel at the Jefferson Hotel, I recall, you know, various lawyers getting up and saying, 'shouldn't we file a motion for a bill of particulars?' and others would say 'no, I don't think that's a good idea', and somebody else would talk about the implications of a nolo plea and the law and the effect of a nolo plea, and in connection with subsequent civil antitrust litigation, there were other—there were other things discussed." (Tr. 45)

Judge Webster's testimony as to the alleged meetings and discussions among counsel was similar (Tr. 53).

Communications among counsel in the *American Oil Co.* case were not confidential. The situation is best described by Judge Webster's testimony:

> "* * * Now, this case was a little different that (sic) some other cases in that the major oil companies had made their peace or were in the process of making their peace with the State of Missouri and the State Highway Department, and a lot of this information was out in the open, in the process of doing this, and so we very early on reached a conclusion that a nolo plea would be in the best interest of our clients, and I don't know that we were proceeding in an investigatory way quite the same way that we might have been." (Tr. 64)

Mr. Allen did not discuss the case with Mr. Coburn; he did not look at debriefing memos; and he did not look at documents (Tr. 77).

Judge Webster testified:

> "Q. (by Ms. Weems) You did not receive any confidential information about any other defendants, is that what you are saying?
>
> A. That's what I'm saying." (Tr. 52)

What happened with respect to the criminal case of *United States v. American Oil Co., et al.* is obvious. The indictment was returned July 22, 1965 (Tr. 82). Less than a month thereafter, a meeting of as many defense counsel as possible was held at the Jefferson Hotel (Tr. 85, 121; Supplemental Submission of Shell and Amoco, February 25, 1977—Memo of John H. Morrison, counsel for American Oil Company). Committees were formed but did little (Memo of John H. Morrison).

The thrust of the discussions between attorneys, after a degree of cooperation was agreed upon, was with respect to the possibility of entering *nolo* pleas and having them accepted by

the District Court (Tr. 88, 122). As stated by Judge Webster, "It was pretty obvious that the Government had a very complete case against the oil companies, and that there was little or no real defense that could be offered * * *" (Tr. 66).

The arraignment was September 8, 1965 (Tr. 92, 108). With no intervening motions, the defendants filed a joint application for change of plea on October 6, 1965 (Tr. 108). On November 19, 1965, pleas of *nolo contendere* were entered and punishment was imposed (Tr. 108). No witness even mentioned preparation for trial in that short period of time.

The Lashly firm was first employed to represent Mr. Edward Gomes, president of Missouri Petroleum Company in 1964 (Tr. 82). Mr. Allen represented the corporation (Tr. 42, 83).

Representation of Homer Riffe, an individual defendant, was undertaken by the Lashly firm after the indictment in July 1965 (Tr. 96). Representation of Kerr-McGee Oil Company and Mr. Jack Mitchell, an employee thereof, began around the first part of September 1965 (Tr. 118). Mr. C. Kenneth Thies represented defendant Phillips Petroleum Company in *United States v. American Oil Co., et al.* Mr. Thies joined the Lashly firm January 1, 1973 and died in July 1974, a year and a half before Mr. Weakley joined the firm. Mr. Rexford Caruthers was employed to represent Patricia Lorenz late in the proceedings and entered his appearance shortly before the sentencing. He did not have sufficient connection with the case for his name to appear on the District Court's Docket Sheet. He attended the sentencing. He joined the Lashly firm January 1, 1968. Plaintiff's counsel disclosed Caruther's representation of Patricia Lorenz in a footnote in the Memorandum in Opposition to the Motion to Disqualify (February 28, 1977).

Mr. Rava testified that his activity prior to the indictment consisted of jointly gathering documents with Mr. Allen on

behalf of Missouri Petroleum Company and its president, Gomes, in answer to a grand jury subpoena (Tr. 83, 84).

During this entire period, the only debriefing statement of any witness seen by Mr. Rava was that of an employee of the corporate client which he prepared with Mr. Allen (Tr. 90). A copy of this statement was not supplied to Mr. Coburn's office by Mr. Rava (Tr. 101). He never went to Mr. Coburn's office to examine any papers (Tr. 91). The only conversations Mr. Rava had with other lawyers in the case prior to the indictment consisted of general discussions with his friends in attempting to find out "something about the scope of what was going on". (Tr. 99, 100, 101).

The only joint documents prepared were the application for a change of plea (Tr. 89) and a supporting brief (Tr. 90). All other representation was on an individual basis (Tr. 90).

Mr. Lashly testified that he attended the first meeting of counsel for all defendants on August 16, 1965 (Tr. 121) and that thereafter—sometime in the first ten days of September, 1965—he entered his appearance for defendants Kerr-McGee Oil Company and its employee, Jack Mitchell (Tr. 121). After pleas of not guilty were entered on September 8, 1965 (Tr. 108), Mr. Lashly attended another meeting of all counsel for all defendants (Tr. 122). At that meeting and from that time on, telephone conferences and correspondence with the Lashly firm clients and with other lawyers, were with reference to whether a *nolo contendere* plea was appropriate, whether the court might accept it, and whether it was in the best interest of the client to enter such a plea (Tr. 122-123).

With reference to debriefing statements supposedly deposited in Mr. Coburn's office, Mr. Lashly stated that not only did he not examine same, but that he was not aware that such a file existed (Tr. 122). The reference to review of debriefing state-

ments contained on the Lashly bill to Kerr-McGee (Shell Ex. A, Pet. Append. 23a, 24a, Tr. 123) pertains to the debriefing statements of employees of Kerr-McGee, including Mr. Mitchell (Tr. 123). Mr. Lashly never saw any other debriefing statements (Tr. 123). No confidential communications were transmitted to Mr. Lashly nor any other member of the Lashly firm, by any employee, witness for, or counsel for Shell or Amoco (Tr. 126).

REASONS FOR DENYING THE WRIT

A. There Is No Conflict With the Decisions of the United States Court of Appeals for the Second Circuit.

Attempts to disqualify a lawyer because of his participation in a prior case are usually bottomed upon Canon 4 which provides that "a lawyer should preserve the confidences and secrets of a *client*." (emphasis supplied)

Clearly the reference is to the lawyer's own client. The rationale of disqualification is that a lawyer should not be permitted to utilize information received in confidence from a client against that client in a later related case.

Where a lawyer brings suit against his own former client no inquiry is made into whether or not there was in fact a confidential communication between them. *Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp.*, 216 F.2d 920 (2d Cir. 1954); *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *Chugach Electric Association v. United States District Court for the District of Alaska*, 370 F.2d 441 (9th Cir. 1966), *cert. denied* 389 U.S. 820 (1967). It is sometimes said that confidential communication is conclusively presumed or inferred as between the lawyer and his former client. *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc., et al.*, 224 F.2d 824 (2d Cir. 1955); *American Can Company v. Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971). *See also Gas-A-Tron of Arizona v. Union Oil Company of California, et al.*, 534 F.2d 1322, 1325 (9th Cir. 1976), where the United States Court of Appeals for the Ninth Circuit expressly refused to infer knowledge of the confidences of the former client as it did in *Chugach Electric Association v. United States District Court for the District of Alaska*, supra. It is established that if a lawyer is disqualified because of conflict of interest with a former client, his entire firm is disqualified. *Consolidated Theatres, Inc. v. Warner Bros. Circuit Management Corp.*, supra; *American Can Company v. Citrus Feed Co.*, supra; *W. E. Bassett Co. v. H. C. Cook Co.*, 201 F.Supp. 821 (D. Conn. 1962). Again no inquiry is made into whether or not the lawyer has in fact communicated to his partners his former client's confidences. That communication is presumed. *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc.*, supra; *American Can Company v. Citrus Feed Co.*, supra; *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976). As to association with a former firm, the presumption, inference or imputation is said to be rebuttable. *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc.*, supra; *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975); *Gas-A-Tron of Arizona v. Union Oil Company of California, et al.*, supra.

It is important to see that these principles arise from the prior attorney-client relationship. Necessarily a client communicates confidential information to his lawyer. Such communication is fundamental to the attorney-client relationship. Necessarily a lawyer's partners are privy to information received from a client. That is the nature of a law partnership. But separate counsel for separate co-defendants, especially in a criminal case, do not necessarily communicate. There is nothing in their relationship to their respective clients or in their relationship to each other which requires communication of confidential information. There is no basis, without proof, for inferring or presuming that counsel for one co-defendant has in fact communicated a client's confidence to counsel for another, or for inferring or imputing knowledge of such a confidence from one to the other.

The decisions of the District Court and the United States Court of Appeals for the Eighth Circuit herein were predicated upon a recognition of these fundamental principles.

Both the Eighth Circuit in the instant case and the Fifth Circuit in *Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977) (decided September 14, 1977, the day the instant case was argued in the Eighth Circuit) have held that there is no presumption of confidential communication among counsel for co-defendants. In the instant case the Eighth Circuit affirmed the District Court's denial of a motion to disqualify after a full evidentiary hearing and a finding of fact, supported by substantial evidence, that there was no communication of client confidences from counsel for co-defendants to members of the Lashly firm in the earlier case, *United States v. American Oil Co., et al.* In the *Abraham Construction Corp.* case the Fifth Circuit reversed the denial of a motion to disqualify for failure to hold an evidentiary hearing on the issue of what, if any, client's confidences had been communicated among counsel for co-defendants. Both the Eighth Circuit herein and Fifth Circuit in *Abraham Construction Corp.* hold that in the absence of proof of receipt of a confidence by counsel for a co-defendant in an earlier case, disqualification is to be denied. These are the only two decisions which deal with this issue. Both decisions rest squarely on well established principles which have their genesis in the attorney-client relationship. Neither decision is in any way inconsistent with the Second Circuit's position.

The three Second Circuit cases relied on by petitioners, *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *NCK Organization Ltd. v. Bregman*, 542 F.2d 128 (2d Cir. 1976); *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977) are concerned with the relationship between two lawyers for the *same client*, not with the relationship between separate lawyers for different clients who are co-defendants.

The issue of whether the *Hull* case or the *NCK* case is applicable was argued to the Eighth Circuit in the instant case. The Eighth Circuit has ruled herein:

> "Absent an attorney-client relationship, no court has applied the presumption inherent in Canon 4. Shell and Amoco's reliance on *NCK Organization Ltd. v. Bregman*, 542 F.2d 128 (2nd Cir. 1976), and *Hull, supra*, for the proposition that an attorney-client relationship is not required for application of Canon 4, is unavailing. In those cases, in-house counsel for the corporate defendants switched sides; in the former by becoming co-counsel of plaintiff's attorney; in the latter by becoming a plaintiff in the suit and retaining the original plaintiff's attorneys. In-house counsel in both cases were presumed to have received information from their former corporate clients, and that information was imputed to the attorneys with whom in-house counsel became associated." (566 F.2d 602, 608)

And further

> "Of itself, representation of a codefendant of B raises no presumption that the lawyer obtained confidential information detrimental to B's interests. Nor may confidential information which B may have imparted to its counsel be imputed to the lawyer. The relationship between individual counsel for separate codefendants differs in structure and function from the relationship between partners in a law firm and from the relationship between co-counsel for a single party." (566 F.2d 602, 609)

The *Fund of Funds* case decided in November 1977 nearly two months after the Eighth Circuit's decision in the instant case, is but another example of the imputation of a former client's confidences between two co-counsel for the same client.

The *Hull* case, the *NCK* case, and the *Fund of Funds* case are not in conflict with the Eighth Circuit's decision in the instant case, or with the Fifth Circuit's decision in the *Abraham Construction Corp.* case because they do not involve the relationship of counsel for co-defendants and are in no way

predicated upon any attempt to infer or presume a communication of confidences among counsel for co-defendants. Each case turns upon the presumption that a lawyer had received confidences from his own client; Delulio from Celanese in the *Hull* case, Randall from ORG in the *NCK* case, and Morgan Lewis from Arthur Andersen in the *Fund of Funds* case. In each case the presumed confidence was imputed between co-counsel for the client's opponent; in the *Hull* case from Delulio to the Rabinowitz firm; both of whom in effect came to represent Hull; in the *NCK* case, from Randall to the Weil firm, both of whom came to represent Bregman; and in the *Fund of Funds* case, from the Morgan Lewis firm to Meister, both of whom came to represent Fund of Funds. The only unique feature of these cases is the so-called "triangular relationship" referred to by the Second Circuit, i.e., the relationship among two co-counsel and the client whom they both represent. The Second Circuit's ruling which imputes confidential information obtained from another client as between two co-counsel for the same client is not unlike the well established ruling that confidential information presumed to be received by one partner in a law firm will be imputed to all of his partners. (*Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc.*, supra; *W. E. Bassett Co. v. H. C. Cook Co.*, supra.) Two lawyers working for a client on the same matter necessarily exchange the information which they have as do law partners. That is not the case with separate counsel for co-defendants. As indicated, the relationship between counsel for co-defendants is not a confidential one, and there is nothing in the relationship itself which requires any communication of client's confidences.

It is important to note that in the *Hull* case, the *NCK* case, and the *Fund of Funds* case counsel actually switched from representing one party in a case to representing the other party in the same case. In the instant case no member of the Lashly firm representing Fred Weber, Inc. ever represented Shell or Amoco.

With respect to the applicability of Canon 9, the Eighth Circuit's quotation from *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976) is apposite.

> "It does not follow, however, that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public. Inasmuch as attorneys now commonly use disqualification motions for purely strategic purposes, such an extreme approach would often unfairly deny a litigant the counsel of his choosing. Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary. . . . Consequently, while Canon 9 does imply that there need be no proof of actual wrongdoing, we conclude that there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." [537 F.2d 804, 813 (footnotes omitted).]

The District Court thought the instant case analogous to *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975). There the Second Circuit affirmed the District Court's denial of Chrysler's motion to disqualify as attorney for plaintiff, Schreiber, an attorney formerly in a law firm representing Chrysler. The Second Circuit, relying on *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures*, 224 F.2d 824 (2d Cir. 1955) held that the inference or presumption that Schreiber had received confidential information from Chrysler during his former association was rebutted by Schreiber's testimony that he did not receive any such information.[3] *Silver*

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[3] The District Court in the instant case held the view that there is here, as in *Silver Plymouth, Inc. v. Chrysler*, supra, a rebuttable inference which has been rebutted. The Eighth Circuit held herein that absent an attorney-client relationship there is no presumption or inference of confidential communication.

Plymouth Chrysler, Inc. v. Chrysler Motors Corp., supra and *Laskey Bros. of West Virginia, Inc. v. Warner Bros. Pictures, Inc.*, supra are much more closely analogous to the instant case than are *Hull, NCK* or *Fund of Funds*, and are a further demonstration that there is no conflict between the views expressed by the Eighth Circuit herein and those held by the Second Circuit.

B. **The Trial Court Correctly Found That No Member of the Lashly Firm Received Any Confidential Information From Any of the Other Defendants in United States v. American Oil Co., et al. This Finding of Fact Is Not Clearly Erroneous.**

It is undisputed that there was no evidence that any member of the Lashly firm received any confidential information from any co-defendant in *United States v. American Oil Co., et al.* There was no evidence of any particular confidential communication claimed by defendants to have been received by any member of the Lashly firm. The Court ordered defendants to produce such evidence first *in camera* by filing all material thereon together with affidavits (Order, April 20, 1977) and then in open court. The record is completely bare of any inference or implication that any member of the Lashly firm in fact received any such communication.

Counsel for defendant Shell, on June 2, 1977, obtained from the Lashly firm's client, Kerr-McGee Oil Company, a copy of the bill to Kerr-McGee (Shell Ex. A, Pet. Append. p. 23a, Tr. 111) which contains among a great number of items, the phrase "review of debriefing statements as applied to Kerr-McGee and Mr. Jack H. Mitchell." Neither Mr. Lashly nor Mr. Rava had any recollection of any review of any debriefing statements in Mr. Coburn's office and denied any such review (Tr. 91, 122). The bill item makes no reference to which debriefing statements are referred to or when or where they were seen. Kerr-McGee

was represented by Lynn Adams, General Counsel for Kerr-McGee and by the Lashly firm. The Lashly firm was employed by Kerr-McGee in September 1965 after the indictment had been returned (Tr. 121). When questioned, Mr. Lashly testified that the bill item referred to debriefing statements of Kerr-McGee's employees (Tr. 123). Petitioners argue at page 5 of their petition that the bill has some significance. It has none at all. It does not even tend to show that any member of the Lashly firm received any confidence of defendant Shell or defendant Amoco in the prior proceedings.

Additionally Petitioners argue at pages 6 and 7 of their petition that generally described conversations among counsel for co-defendants are tantamount to disclosure of clients confidences. Both the District Court and the Eighth Circuit correctly held otherwise. The District Court afforded Shell and Amoco the opportunity to produce *in camera*, without disclosure to Weber's counsel, any alleged confidential information which they claim was disclosed to the Lashly firm. None was forthcoming. In this posture of the record and in view of Mr. Lashly and Mr. Rava's denials that any confidences were received, it is inappropriate for petitioners to attack the District Court's findings of fact which must stand unless they are "clearly erroneous." (*United States v. United States Gypsum Company*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948); Rule 52(a), Federal Rules of Civil Procedure). The District Court has discretionary responsibility for the supervision of the members of its Bar and the exercise of that discretion will be disturbed on appeal only where it has been abused. Courts of appeal have affirmed the exercise of such discretion both where the district court has ordered an attorney disqualified, *Allied Realty of St. Paul, Inc. v. Exchange National Bank of Chicago*, 408 F.2d 1099 (8th Cir. 1969); *Hull v. Celanese Corp.*, supra, and where the district court has declined to do so, *Akerly v. Red Barn System, Inc.*, 551 F.2d 539 (3d Cir. 1977).

C. **Petitioners' Circular Argument Concerning Claimed Confidences.**

Petitioners argue that the Eighth Circuit's decision herein threatens information claimed to have been exchanged in confidence between counsel for co-defendants in the 1965 case. Petitioners point to *In re Grand Jury Subpoena Duces Tecum*, 406 F.Supp. 381 (S.D.N.Y. 1975); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964), as authorities for the proposition that one client's confidence communicated to counsel for a co-defendant is entitled to the protection of the attorney-client privilege. Each case gave protection to a specific communication and prohibited its disclosure either by way of discovery or as evidence at trial. The cases do not raise or deal with the issue of disqualification. Petitioners in effect argue here that there was a confidential communication because the relationship between counsel for co-defendants in the 1965 case was a confidential one and that the relationship was a confidential one because there were confidential communications. There is no authority for the proposition that the relationship between counsel for co-defendants is a confidential one, and the proof is that there were no communications of confidence to members of the Lashly firm. The Eighth Circuit quite correctly rejected petitioners' circular argument.

D. **Petitioners' Unfounded Innuendos.**

The petitioner oil companies point out at pages 7 and 8 of their petition that the original Complaint herein filed December 8, 1975 by Messrs. Edward D. Weakley and Michael J. Aubuchon on behalf of plaintiff Fred Weber, Inc. contained no conspiracy, price fixing or restraint of trade allegations and that such allegations were included in the Amended Complaint filed May 3, 1976 after Mr. Weakley joined the Lashly firm. The

case originally came to Mr. Weakley. He made an agreement in October 1975 to join the Lashly firm effective January 1, 1976. He became ill. Mr. Rava of the Lashly firm, who is claimed by petitioners to have somehow acquired some of their confidences in the earlier case, actually did considerable drafting on the original Complaint. (Weber's Verified Return to Motion to Disqualify filed February 28, 1977.) Petitioners suggest by innuendo that the chronology of the Complaint and the Amended Complaint is the basis for an inference that the conspiracy, price fixing and restraint of trade allegations in the Amended Complaint are the result of some Shell or Amoco confidence possessed by the Lashly firm. The suggestion is a *non sequitur* considering Mr. Rava's extensive participation in the drafting of the original Complaint. The Amended Complaint was filed only after the initial stages of discovery and the independent investigation conducted by Mr. Weakley and Mr. Rutherford of the Lashly firm in early 1976.

Petitioners suggest, again by innuendo only, that some significance is to be attached to Judge Regan's recusing himself. Judge Regan was convinced that Shell and Amoco were guilty of criminal conduct in 1965 and he felt that there might be some appearance of partiality on his part. The requirement of judicial impartiality has nothing to do with the qualification or disqualification of adversary counsel.

Petitioners suggest at pages 8, 9, 11 and 19 of their petition that the Lashly firm "switched sides". It did not. No member of the Lashly firm ever represented Shell or Amoco. No member of the Lashly firm was ever on their "side".

CONCLUSION

Shell and Amoco have the burden of proof on a motion to disqualify. *American Can Company v. Citrus Feed Company*, supra; "Representation of Interest Adverse to that of a Former

Client," 55 Boston University Law Review 61 (1975). There was no proof of an attorney-client relationship between any member of the Lashly firm and Shell or Amoco. There was no proof of the communication of any client's confidence to any member of the Lashly firm by any counsel for a co-defendant in *United States v. American Oil Co., et al.*, supra. There was in fact no attorney-client relationship. There was in fact no communication of a client's confidence.

Both the District Court and the Eighth Circuit correctly perceived the dual nature of the failure of proof and correctly denied the motion to disqualify. The petition for certiorari should be denied.

Respectfully submitted,

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